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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA,

SAN FRANCISCO/OAKLAND DIVISION

JANE ROE, an individual; MARY ROE,  
an individual; SUSAN ROE, an  
individual; JOHN ROE, an individual;  
BARBARA ROE, an individual;  
PHOENIX HOTEL SF, LLC, a  
California limited liability company;  
FUNKY FUN, LLC, a California limited  
liability company; and 2930 EL  
CAMINO, LLC, a California limited  
liability company,

Plaintiffs,

v.

CITY AND COUNTY OF SAN  
FRANCISCO, a California public entity,

Defendants.

Case No. 4:24-cv-01562-JST

**PLAINTIFFS' REPLY BRIEF IN  
SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

**ASSIGNED FOR ALL PURPOSES  
TO THE HONORABLE DISTRICT  
JUDGE JON S. TIGAR,  
COURTROOM 6**

Action Filed: 03/14/2024  
Trial Date: Unassigned

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1 purported expert opinion as lacking foundation and being irrelevant to the City's  
2 *smoking*-based harm reduction policies that are currently under scrutiny.

3 The City is not immune from Plaintiffs' public and private nuisance claims. Its  
4 immunity claim is based entirely on its interpretation of Civ. Code § 3482. That code  
5 section provides immunity only in situations where the nuisance conduct is "done or  
6 maintained under the express authority of a statute." But the City has shown no  
7 express statutory language that allows it to distribute otherwise-illegal drug smoking  
8 paraphernalia such as fentanyl pipes. As discussed below, the Legislature has allowed  
9 the distribution of *injection*-related supplies such as syringes, and related materials,  
10 to IV drug users in order to prevent *bloodborne* pathogens.

## 11 II. STATEMENT OF ADDITIONAL FACTS AND EVIDENCE

### 12 A. **The City Has Averred on the Record in Multiple Prior Lawsuits that 13 Distribution of DSP in the Tenderloin is Both Harmful and a 14 Nuisance.**

15 The City's own litigation and public statements demonstrate that it recognizes  
16 the harms caused by the open availability of drug-smoking paraphernalia in the  
17 Tenderloin. On April 10, 2025, the City Attorney, acting on behalf of the City and the  
18 People of the State of California, filed multiple civil enforcement actions against  
19 Tenderloin markets—including Ed's Market, Family Corner Discounts, and 115 Turk  
20 Street LLC—alleging that the sale of glass pipes, steel wool, and other smoking  
21 paraphernalia created a public nuisance. (Declaration of Ashcon Minoiefar ("Minoiefar  
22 Dec.") ¶¶2-4, Ex. A–C.) The City Attorney simultaneously issued a press release about  
23 those lawsuits. (Minoiefar Dec. ¶5, Ex. D.)

24 In those complaints, the City alleged that selling such paraphernalia "attracted  
25 criminal and nuisance activity to the surrounding community...adversely affecting the  
26 neighborhood and the health, safety, and well-being of those who live and work in the  
27 area." (Minoiefar Dec. ¶¶2-4, Ex. A ¶2; Ex. B ¶2; Ex. C ¶2.) It further alleged that the  
28 sale of items "used to ingest or inhale controlled substances" "adversely affects public  
health, contributes to illegal drug activity, and contributes to other criminal activity."

(Minoiefar Dec. ¶2-4, Ex. A ¶ 54; Ex. B ¶ 45; Ex. C ¶ 41.) The City Attorney’s press release reinforced those allegations, describing the stores as “magnets for substantial illegal activity” that “threaten the safety of the children, families, and seniors in [the] community.” (Minoiefar Dec. ¶5, Ex. D.)

**B. The City’s New Policy Regarding Distribution of DSP.**

Plaintiffs recently obtained a copy of the City’s April 2, 2025 directive setting forth the City’s new policy regarding distribution of DSP, which took effect on April 30, 2025. (Minoiefar Dec. ¶6, Ex. E.) Notably, this version of the policy differs significantly from a version dated a day earlier, April 1, 2025, which the City proffered in its opposition. (ECF No. 105-53, Ex. G to Philip Dec.) The April 2 policy lists actions that DSP suppliers “must implement,” including providing proactive counseling and connections to treatment as part of distribution of DSP. The policy then adds qualifying language “to the extent practical and receivable by the participant.” (Minoiefar Dec. ¶6, Ex. E at 2.) As discussed below, the City allows its lead DSP contractor to interpret this qualifying language as giving them license to do business as usual, meaning hand out the DSP without counseling.

**C. The City’s Policy Sanctions the Distribution of DSP to Minors.**

The City’s new policy expressly authorizes the distribution of smoking paraphernalia to minors. (Minoiefar Dec. ¶6, Ex. E at section 4, p.3.)<sup>1</sup> The policy provides that “safer use supply services may not be restricted by age” and that programs “must provide more frequent proactive counseling and age-appropriate connections to treatment for people seeking services under the age of 18.”<sup>2</sup> (*Id.*) In other words, the City formally permits its contractors to hand out fentanyl pipes and other smoking implements to children.

Tyler TerMeer, PhD, the CEO of SFAF—the City’s principal contractor for

<sup>1</sup> The April 1 version that the City supplied to this Court did not contain this provision.

<sup>2</sup> The policy claims this provision is “in alignment with” California Health & Safety Code §121349. However, nothing in that statute remotely authorizes the distribution of DSP to minors.

1 distributing DSP—confirmed that this policy is applied literally. When asked if a  
 2 person “who looked like they were ten years old” could obtain smoking paraphernalia,  
 3 TerMeer answered that under the policy “no matter their age, they would show up and  
 4 go through the same process” and “they would get supplies if that’s what they were  
 5 there for after they have received counseling.” (Minoiefar Dec. ¶8, Ex. F, at 72:15–25.)  
 6 He explained that SFAF does not ask for identification and provides the same  
 7 supplies—including glass pipes—to any individual who requests them. (*Id.*) Dr. Susan  
 8 Philip, the City’s Health Officer and its declarant, gave similar testimony. She  
 9 admitted that, under the City’s new 2025 policy, “it is possible that [a 14-year-old]  
 10 could” receive smoking supplies so long as counseling is offered. (Minoiefar Dec. ¶9,  
 11 Ex. G, at 168:13–23.) Indeed, earlier this year, Omar Ward documented a 17-year-old  
 12 collecting DSP in the Tenderloin. (Minoiefar Dec. ¶9, Ex. H, at 222:10-17.)

13 **D. The City’s Policy Vests Its Contractors with Vast Discretion to Forego**  
 14 **Counseling When Handing Out DSP.**

15 Dr. TerMeer testified that SFAF was directed to draft its own policies  
 16 expounding on the City’s new April 2 policy, that the DPH then approved. (Minoiefar  
 17 Dec. ¶8, Ex. F, at 40:2-11.) The SFAF’s policy gives staff wide discretion to hand out  
 18 DSP without offering counseling or connections to treatment. (*Id.*, at 47:20-49:20.) “We  
 19 would still provide them with access to the safer use supplies they are requesting.”  
 20 (*Id.*, at 48:6-8.) When asked about the public health benefits of furnishing DSP, he  
 21 “believes” it would reduce the risk of people “burning their lips,” inhaling other  
 22 substances, and infectious diseases. (*Id.*, at 55:21-56:15.)

23 **E. SFPD Commander Scott Biggs’s Testimony Confirms That the**  
 24 **Distribution of Smoking Supplies Fuels the Tenderloin Drug Market.**

25 Commander Scott Biggs is among the most senior officers in the San Francisco  
 26 Police Department. He reports directly to the Deputy Chief of the Field Operations  
 27 Bureau and has command responsibility for multiple police districts, including the  
 28 Tenderloin. (Minoiefar Dec. ¶11, Ex. I, at 11:8-10.) Three captains report to him—those



1 commanding the Tenderloin, Mission, and Northern Stations. (*Id.*, at 11:14-12:02.)  
2 Within his portfolio, Commander Biggs oversees the Drug Market Agency  
3 Coordination Center (“DMACC”), the City’s multi-agency initiative charged with  
4 dismantling the open-air drug markets that have long plagued the Tenderloin. (ECF  
5 no. 105-72, at ¶ 2.)

6 DMACC coordinates the work of more than a dozen City and state entities,  
7 including SFPD, the Department of Public Health (“DPH”), Public Works, the  
8 Department of Emergency Management (“DEM”), and the City Attorney’s Office. (ECF  
9 No. 105-72, at ¶ 4.) Its mission is to identify drug hot spots, direct enforcement  
10 operations, and coordinate abatement and outreach efforts. (Minoiefar Dec. ¶11, Ex. I,  
11 22:9-21 and 23:18-25; ECF no. 105-72, at ¶¶ 3-4.) Biggs explained that this assignment  
12 places him at the center of the City’s response to the Tenderloin drug crisis. (Minoiefar  
13 Dec. ¶11, Ex. I, at 14:22-24.)

14 Biggs testified that through his work he has come to understand the  
15 Tenderloin’s drug problem as a single, interconnected “ecosystem.” (*Id.*, at 30:1-19.) In  
16 this ecosystem, open-air drug dealing, street-level fencing, and theft feed one another:  
17 users steal goods, resell them in sidewalk markets, and use the proceeds to buy drugs.  
18 (*Id.*) Biggs explained that handing out smoking paraphernalia perpetuates this cycle,  
19 because it normalizes street-level drug use and enables users to remain in the open-  
20 air markets longer. He described this as part of a “vicious cycle” in which public use  
21 and public dealing reinforce one another. (*Id.*, at 30:20-21.)

22 Biggs testified that the two illicit drugs most commonly used in the Tenderloin  
23 are fentanyl and methamphetamine (*Id.*, at 17:8-11.) He explained that glass pipes,  
24 tin foil, and Brillo are used to smoke these drugs. (*Id.*, at 18:6-20:15.) He agreed that  
25 this photo, taken on October 25, 2025, showed typical night street conditions in the  
26 Tenderloin:





(Minoiefar Dec. ¶11, Ex. I, at 31:7-32:22 and Ex. 1 thereto.)

Biggs confirmed that crowds such as the one shown in the above photo are typically made up of drug users and drug dealers. (*Id.*, at 32:23-33:06.)

Despite his central role and knowledge base, no one from SFDPH, the Mayor's Office, or the City Attorney's Office consulted Biggs before implementing or expanding the City's DSP policy. (*Id.*, at 42:6-19; 43:7-12; 47:11-19.) He was not asked to provide input, has never been briefed on where the supplies are being distributed, and had no opportunity to explain the policy's predictable impact on neighborhood safety. Indeed, the City's own senior law-enforcement official responsible for combating Tenderloin drug markets was excluded entirely from the policy-making process.

Biggs further testified that the same types of paraphernalia the City now funds for free distribution—pipes, foil, and straws—are recognized by law enforcement as indicators of drug activity. (*Id.*, at 36:11-37:08) He confirmed that SFPD officers have supported the City Attorney's nuisance lawsuits against Tenderloin stores that sold such items, and that the sale or possession of this paraphernalia is commonly treated as evidence of illegal drug activity. (*Id.*, at 36:11-37:13.) Biggs's testimony, from a City-

1 selected declarant, establishes that the policy directly undermines his department's  
2 efforts to suppress drug markets and protect Tenderloin residents.

### 3 **F. Deposition Testimony of Omar Ward**

4 Omar Ward provided a declaration in support of plaintiffs' motion, and the City  
5 deposed him on November 7, 2025. He does not know any of the plaintiffs. (Minoiefar  
6 Dec. ¶10, Ex. H., at 17:14-17.) He spends the majority of every day in the Tenderloin  
7 and frequently walks or ride his scooter around the sidewalks and streets there. (*Id.*  
8 at 186:7-18.) He also owns a business in the Tenderloin. (*Id.* at 62:6-15.) Mr. Ward has  
9 been aware of drug use on the streets of San Francisco for decades, but not the way it  
10 has evolved in the past five to six years. (*Id.* at 175:1-11.) Unlike before, people now  
11 use drugs openly. (*Id.* at 175:5-11.) Drug sales are also conducted in the open. (*Id.* at  
12 175:12-24.) Since 2022, he has been video documenting the conditions, and he has a  
13 catalog of over 500 videos. (*Id.* at 24:5-9 and 40:20-21.) He posts about Tenderloin  
14 conditions through his social media account. (*Id.* at 24:5-7.)

15 Since Ward started making his videos in 2022, there have been no significant  
16 changes in the Tenderloin. (*Id.* at 167:25-168:04.) "[E]verything just shift from street  
17 to street, another block to another block." (*Id.*) In the past six months, there have been  
18 improvements in some areas (*Id.* at 176:5-6.), but even after City street crews address  
19 a nuisance complaint, the drug users immediately return. (*Id.* at 169:19-170:11 and  
20 176:7-15.)

21 Ward has witnessed the distribution of DSP from 290 Turk Street, the  
22 headquarters of the Hospitality House ("HH") (*Id.* at 191:3-10), which corroborates the  
23 averments of Plaintiff Mary Roe. (ECF no. 101-5 at ¶¶ 2, 6.) Plaintiffs deposed Joseph  
24 Wilson, the executive director of HH. He testified that HH has had a contract with the  
25 City for a number of years to provide "harm reduction" services out of 290 Turk Street.  
26 (Minoiefar Dec. ¶12, Ex. J, at 7:6-8, 12:11-14, and 15:8-20.) Under a 2024 contract, the  
27 City is paying HH as much as \$8.6 million over a two-year period. (*Id.* at 37:13-38:10.)  
28

1 HH subcontracts with the “Harm Reduction Therapy Center,” which also  
2 provides services at 290 Turk Street. (*Id.* at 14:3-12 and 33:1-8.) Wilson learned of  
3 allegations that smoking supplies were being handed out at 290 Turk Street, but did  
4 nothing to investigate them. (*Id.* at 31:2-32:07 and 35:7-20.) He was given several  
5 opportunities to acknowledge that open drug use on the Tenderloin’s sidewalks causes  
6 harm. But he declined, replying, “That’s a subjective, you know, opinion.” (*Id.* at 42:14-  
7 43:18.) He has seen children walking by open drug use and drug sales but reaffirmed  
8 that he had “[n]o real opinion” about whether that could be harmful to them. (*Id.* at  
9 44:7-14.)

10 **G. Deposition Testimony of Susan Philip, MD.**

11 Dr. Susan Philip, the City’s Health Officer and Director of the Population Health  
12 Division, testified about her understanding of the City’s policies and the rationale  
13 advanced for distributing drug-smoking paraphernalia. Her testimony confirms both  
14 the speculative nature of the City’s claimed benefits and the absence of evidence that  
15 those benefits are being realized in practice.

16 Dr. Philip identified three potential public-health “benefits” that she believes  
17 might arise from the City’s distribution of drug-smoking supplies: (1) that coupling the  
18 distribution with counseling could help connect people who use drugs to treatment or  
19 recovery services; (2) that providing sterile smoking materials might reduce the spread  
20 of communicable or viral disease; and (3) that furnishing unbroken pipes might  
21 prevent users from cutting their lips on cracked or damaged ones. (Minoiefar Dec. ¶9,  
22 Ex. G, at 106:21-107:08.)

23 Dr. Philip testified that one possible benefit is “engaging a person who uses  
24 drugs via smoking in a conversation with a health worker or a member of a staff of a  
25 community-based organization so that they are told about opportunities for treatment  
26 and recovery in San Francisco.” (*Id.* at 112:2-13.) She further explained that continuing  
27 engagement with service providers “could be a benefit,” by “keeping a person engaged  
28 with public health entities to continue to assess readiness for core treatment and offer

1 those.” (*Id.* at 112:14-113:2.) She also stated that providing new supplies might reduce  
 2 disease transmission because “there can also be transmission of communicable  
 3 diseases through sharing of those materials, including potentially hepatitis and viral  
 4 infections.” (*Id.* at 107:2-5.) Finally, she suggested that providing new pipes could  
 5 “avoid that potential for injury from a cracked or broke pipe.” (*Id.* at 107:23-108:13.)

6 However, Dr. Philip acknowledged that she has no evidence that any of these  
 7 potential benefits are occurring in practice. When asked if she knew whether people  
 8 receiving smoking supplies were actually being linked to treatment, she responded: “I  
 9 am not aware of - - those data.” (*Id.* at 164:9–14.) She also admitted she had never  
 10 “heard of” anyone cutting their lips on broken pipes (*Id.* at 108:15–109:2.) and could  
 11 not identify any instances of diseases being transmitted or prevented through shared  
 12 smoking implements in San Francisco. (*Id.* at 109:19-110:10.) She conceded that she  
 13 had never published any work in the field of addiction medicine and could not cite any  
 14 peer-reviewed article documenting a public-health benefit from distributing smoking  
 15 paraphernalia. (*Id.* at 9:11–13 and 171:2–17.)

#### 16 **H. Declaration of Dr. Ricky Bluthenthal.**

17 Plaintiffs have separately objected to Dr. Bluthenthal’s declaration and the  
 18 statements therein. (See Plaintiff’s Obj to Dec, of Dr. Bluthenthal.) As stated in the  
 19 objections, his testimony is based on literature related to IV drug use. There is  
 20 insufficient data and literature to support his conjecture and aspirational statements  
 21 about the efficacy of DSP programs.

### 22 **III. LEGAL ARGUMENT**

#### 23 **A. The City Contradicts Its Prior Averments and Admissions About the 24 Many Harms Caused by DSP.**

25 The City’s nuisance complaints, discussed above, identified the same harms that  
 26 Plaintiffs and even the City’s own employees have described—crime, disorder, and  
 27 neighborhood decay caused by the open availability of drug paraphernalia. Yet while  
 28 the City Attorney condemns private retailers for selling such items, the City now

1 defends a policy that funds their free distribution through its contractors. The  
2 inconsistency between the City’s prior and present positions is striking: it asserts that  
3 the sale of drug-smoking paraphernalia harms public health when done by others but  
4 claims it promotes public health when done by itself.

5 This contradiction is important to the fair adjudication of this matter. Judicial  
6 estoppel “prevents parties from deliberately changing positions according to the  
7 exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Courts  
8 applying the doctrine consider whether (1) a party’s later position is clearly  
9 inconsistent with an earlier one, (2) the earlier position was accepted by a court, and  
10 (3) allowing the change would create an unfair advantage or impose an unfair  
11 detriment. *Id.* at 750–51. The Ninth Circuit applies these factors flexibly to protect  
12 “the integrity of the judicial process,” even when the prior proceedings are ongoing and  
13 subject to additional considerations to inform the doctrine’s application in specific  
14 factual contexts. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782–83 (9th  
15 Cir. 2001); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600–04 (9th  
16 Cir. 1996).

17 The City’s current position—that distributing identical paraphernalia through  
18 City-funded programs benefits public health and mitigates harm—is directly  
19 inconsistent with the position it has taken in its own nuisance suits. Although those  
20 suits remain pending and no court has yet granted relief, the Court may consider these  
21 contradictions under this specific factual context. It is enough that the City invoked  
22 the courts’ equitable powers to abate nuisance conditions caused by the sale of drug-  
23 smoking paraphernalia, then reversed course to defend the same conduct under a  
24 different label. Permitting the City to advance these incompatible positions would  
25 undermine confidence in the judicial process and afford it an unfair advantage.

26 At minimum, the City’s conflicting pleadings and public statements confirm its  
27 awareness that distributing or selling drug paraphernalia fosters the very harms it  
28 now minimizes—open drug use, crime, and deterioration of neighborhood conditions.



1 That acknowledgment, made in the City's own name and in formal court filings,  
2 reinforces Plaintiffs' showing that the City's drug-smoking-supply policy perpetuates  
3 a public nuisance in the Tenderloin rather than alleviating it.

4 **B. The City's Claimed Benefits Are Speculative and Outweighed by the**  
5 **Harm Its Policy Causes.**

6 Only two of the City's declarants—Dr. Susan Philip and Dr. Ricky  
7 Bluthenthal—offer opinions about any purported benefits from furnishing drug-  
8 smoking paraphernalia. Every other City declarant confines their testimony to  
9 describing the City's law-enforcement, outreach, and cleanup efforts in the Tenderloin.  
10 Far from supporting the City's position, this evidence underscores Plaintiffs' point: the  
11 City's own witnesses confirm that its substantial resources are devoted to mitigating  
12 the very harms that its DSP-distribution policy helps create. The City thus offers  
13 speculation from two public-health officials about hypothetical benefits, while the rest  
14 of its record acknowledges an ongoing need to combat the disorder and nuisance  
15 conditions the policy perpetuates.

16 Dr. Philip identified three speculative possibilities: that distribution might help  
17 connect users to treatment, prevent the spread of communicable disease, or avoid  
18 minor lip injuries. Yet she conceded that she has no data showing that any of these  
19 outcomes are occurring, has never heard of anyone cutting their lips on broken pipes,  
20 and could not identify a single example of reduced disease transmission or successful  
21 treatment referral. Dr. Bluthenthal's opinions are based on literature about syringe-  
22 exchange programs and intravenous drug use, not the smoking-based paraphernalia  
23 at issue here. Neither witness offers evidence that the City's policy has produced any  
24 measurable benefit.

25 Even if limited benefits occur in isolated instances, the record shows that the  
26 harms of the City's policy greatly outweigh them. As Commander Biggs's testimony  
27 and the City's own nuisance lawsuits demonstrate, the open availability of smoking  
28 paraphernalia fosters public drug use, attracts dealers, and contributes to disorder,

1 crime, and neighborhood decay in the Tenderloin. The policy normalizes visible drug  
2 activity in a neighborhood with a high concentration of families and children, creating  
3 unsafe conditions for residents and undermining the City's efforts to restore safety and  
4 public health.

5 Moreover, the City's policy is neither narrowly tailored nor effectively  
6 implemented. The April 2, 2025 directive allows distribution "to the extent practical  
7 and receivable by the participant," leaving its enforcement to contractor discretion.  
8 The City's lead contractor, SFAF, admits it continues to hand out supplies even when  
9 counseling does not occur. Dr. Philip herself could not identify a single individual who  
10 has entered treatment as a result of this policy. Without data showing that distribution  
11 has produced actual treatment linkages or measurable public-health gains, the  
12 purported benefits remain theoretical.

13 The record also reveals that these supposed benefits come at a steep cost to the  
14 surrounding community. Dr. Philip agreed that public drug use and discarded  
15 paraphernalia create unhealthy and unsafe conditions in neighborhoods like the  
16 Tenderloin. (Minoiefar Dec. ¶9 Ex. G, at 38:14–23 and 183:22–184:05.) Yet the City  
17 continues to defend a policy that perpetuates those very conditions. The City's  
18 speculative hopes for incidental benefits cannot outweigh the documented harms of its  
19 own conduct—harms the City itself has recognized in its pending nuisance lawsuits.  
20 Handing out smoking paraphernalia under the guise of "harm reduction" deepens,  
21 rather than relieves, the crisis in the Tenderloin.

22 **C. The City Has Presented a Distorted Visual Record of Conditions.**

23 The City's credibility on the claimed benefits of the DSP policy is further  
24 undermined by its presentation of evidence in its opposition. In support of its  
25 contention that conditions have been abated, Defendant showed Google Street View  
26 images to plaintiffs depicting the blocks where they live or work – for example the  
27 30(b)(6) witness for Plaintiff Phoenix Hotel. (ECF. No. 105-1, Defs. Opp., at 11:20-25;  
28 ECF. No. 105-27, Ex, 27, at 179:22-25.) In that instance, the City showed a partial



1 Google Street View from November 2021, that appeared to depict the hotel’s sidewalk  
 2 orderly and free of drug activity, eliciting the witness’s reluctant concession that it  
 3 appeared to be a fair and accurate depiction of conditions on that date. (*Id.*) But when  
 4 the complete Street View image is viewed, it reveals just off screen highly relevant  
 5 evidence the City left on the editing room floor—depicting large numbers of people  
 6 congregated along the sidewalk, debris, encampments, and the very nuisance  
 7 conditions alleged by Plaintiffs. (Minoiefar Decl. 13-16, Ex. K-M.) This selective and  
 8 misleading presentation of evidence to the Court undermines the City’s credibility and  
 9 reinforces the need for the Court to view the City’s factual assertions with caution.

10 **D. The City Is Not Immune from Nuisance Liability.**

11 Civil Code § 3482 states, “Nothing which is done or maintained under the  
 12 express authority of a statute can be deemed a nuisance.” The California Supreme  
 13 Court has repeatedly held that immunity from nuisance liability under section 3482  
 14 applies only if the acts complained of as a nuisance are authorized either “by the  
 15 express terms of the statute under which the justification is made,” or “by the plainest  
 16 and most necessary implication from the powers expressly conferred.” (*Nestle v. City*  
 17 *of Santa Monica* (1972) 6 Cal.3d 920, 938, fn. 16, citing *Hassell v. San Francisco* (1938)  
 18 11 Cal.2d 168, 171.)

19 The Supreme Court has explained that the requirement of “express  
 20 authorization *embodied in the statute itself*” ensures that “an unequivocal legislative  
 21 intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that  
 22 would result were every generally worded statute a source of undetermined immunity  
 23 from nuisance liability.” (*Greater Westchester Homeowners Assoc. v. City of Los Angeles*  
 24 (1970) 26 Cal.3d 86, 101, citing *Varjabedian v. City of Madera* (1978) 20 Cal.3d 285,  
 25 291, emphasis added.)

26 **1. Section 121349.1 Does Not Support the City’s Argument**

27 Health & Safety Code Section 121349.1 merely states that, in the context of a  
 28 needle and syringe exchange program to “combat the spread of HIV and bloodborne

1 hepatitis infection among *injection* drug users,” those who participate in a needle and  
 2 syringe exchange program:

3 “shall not be subject to *criminal* prosecution for violation of  
 4 any law related to the possession, furnishing, or transfer of  
 5 hypodermic needles or syringes or any materials deemed by  
 6 a local or state health department to be necessary to  
 7 prevent the spread of communicable diseases, or to prevent  
 8 drug overdose, injury, or disability during participation in  
 9 an exchange project.” (*Id.*, emphasis added.)

10 In other words, the conduct remains illegal (and a nuisance under Civ. Code §  
 11 3479) but needle exchange program participants are immunized from *criminal*  
 12 prosecution. This language shows that the legislature contemplated the possibility of  
 13 liability and expressly limited the scope of immunity to criminal prosecution only.

## 14 **2. Section 120780.2 Does Not Support the City’s Argument**

15 In 2021, Health & Safety Code Section 120780.2 was amended to specify that  
 16 the purchase of “hypodermic needles and syringes, and other supplies” was intended  
 17 to reduce the spread of “potentially deadly *bloodborne* pathogens” (emphasis added).  
 18 The prior version of section 120780.2 referred more generally to “potentially deadly  
 19 pathogens.” The addition of the limiting term “bloodborne” shows a clear legislative  
 20 intent to limit the purchase (and subsequent furnishing) of such supplies by the State  
 21 to people who *inject* drugs.

## 22 **3. There Is Simply No Express Language to Support an Immunity.**

23 There is no statutory language explicitly authorizing the furnishing of “drug  
 24 smoking paraphernalia,” pipes, straws, foil, or (in the City’s words) “safer smoking  
 25 supplies.” The California Supreme Court has repeatedly held that such express  
 26 language is necessary in order invoke the section 3482 immunity. The words “any  
 27 materials” in section 121349.1 and “other supplies” in section 120780.2 are vague  
 28 because they are categorical, general, and unspecified. They epitomize the type of  
 “generally worded statute” that the Supreme Court feared would make the scope of an  
 immunity uncertain.

1 IV. CONCLUSION

2 Ironically, the City *itself* has sued several local business that it alleges sell DSP.  
3 In those lawsuits, the City has taken on Plaintiffs' position: that the presence of DSP  
4 is a nuisance that causes harm in the neighborhoods where it is distributed and  
5 attracts other forms of criminal activity such as loitering and drug sales. The City has  
6 rhetorically transmuted the vague wording and limited immunity from criminal  
7 prosecution into full-blown immunity from all liability, including nuisance liability.  
8 This is impermissible under the *Hassell* line of cases discussed above. Because the  
9 cited statutory language is vague, it affords no immunity for nuisance conditions  
10 arising from the furnishing of drug smoking paraphernalia to drug addicts. Given that  
11 the harms of the City's policy clearly outweigh any benefits, and given the City's lack  
12 of immunity for its conduct, the Court should grant Plaintiffs' motion.

13  
14 Dated: November 21, 2025

WALKUP, MELODIA, KELLY & SCHOENBERGER

15  
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**PROOF OF SERVICE**

**Jane Roe, et al. v. City and County of San Francisco, et al.  
USDC-Northern California Case No. 4:24-cv-01562-JST**

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23  
24 **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the  
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28 I declare under penalty of perjury under the laws of the United States of  
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1 a member of the bar of this Court at whose direction the service was made.

2 Executed on November 21, 2025, at San Francisco, California.

3 

4 

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Kirsten Benzien